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CITY OF HENDERSON, DETECTIVE
PERDUE and CHIEF PATRICK MOERS

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

HARVESTER HARRIS,

Plaintiff,

v.

CITY OF HENDERSON; a political
subdivision of the State of Nevada; LAS
VEGAS METROPOLITAN POLICE
DEPARTMENT, a political subdivision of the
State of Nevada; SHERIFF DOUG
GILLESPIE, individually; CHIEF PATRICK
MOERS, individually; DOE OFFICER I,
individually; DOE OFFICER II, individually;
DOE OFFICERS III-X; and JOHN DOES I-
X, inclusive,

Defendants.

CASE NO.: 2:15-CV-00337-GMN-PAL

**DEFENDANTS CITY OF HENDERSON
DETECTIVE PERDUE AND CHIEF
PATRICK MOERS' REPLY IN
SUPPORT OF THEIR MOTION TO
DISMISS PLAINTIFF'S FIRST
AMENDED COMPLAINT**

COME NOW, Defendants CITY OF HENDERSON ("CITY"), DETECTIVE PERDUE
("PERDUE") and PATRICK MOERS ("CHIEF MOERS"), collectively referred to as
"HENDERSON DEFENDANTS", by and through their attorneys Josh M. Reid, City
Attorney and Nancy D. Savage, Esq., Assistant City Attorney for the CITY OF



HENDERSON, and provide this Reply in Support of their Motion to Dismiss Plaintiff's First Amended Complaint (Doc. 28).

This Reply is made and based upon the papers and pleadings on file herein and any oral argument at the time of the hearing in this matter, if any.

DATED this 7th day of October, 2015.

CITY OF HENDERSON
JOSH M. REID, City Attorney

/s/ Nancy D. Savage

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DETECTIVE PERDUE

I.

FACTUAL SUMMARY

In summary, the Plaintiff's First Amended Complaint (Doc. 28) alleges the following factual sequence of events:

- Plaintiff's vehicle was stopped by and unmarked SUV, First Amended Complaint ¶ 20
- Defendant NIELSON (Metro Officer) asked if Plaintiff was in a hurry. Plaintiff said he was responding to a radio call and advised that the Officers were on camera. NEILSON threatened to call the Taxicab Authority. ¶ 22

- DETECTIVE PERDUE (Henderson Officer) “slapped” his badge against the passenger window and identified himself as a police officer and yelled profanities at Plaintiff. Plaintiff told the Officers that he was not resisting and did not know that NIELSON and PERDUE were police officers. Then NIELSON (Metro) grabbed Plaintiff’s hands and “maliciously” pulled his finger to inflict pain. ¶ 23
- Plaintiff suffered an injury to his right middle finger. ¶ 25

The allegations against all of the HENDERSON DEFENDANTS are all based upon PERDUE’S conduct as alleged above. The allegations concerning the acts or omissions underlying all of Plaintiff’s claims which have not been set forth above, are conclusory and speculative, so should not be accepted for the truth of the matters asserted on a motion to dismiss.

II.

PLAINTIFF HAS NOT ALLEGED FACTS WHICH ARE SUFFICIENT TO STATE A PLAUSIBLE CLAIM AGAINST THE CITY OR CHIEF MOERS UNDER 42 U.S.C. §1983

Beyond the alleged facts summarized above, Plaintiff’s First Amended Complaint consists of vague, non-specific speculative and conclusory allegations which are repeated and incorrectly referred to as “facts” in Plaintiff’s Opposition. Calling something a fact does not make it one. While all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party on a Fed. R. Civ. Pro. 12(b)(6) motion to dismiss, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss. Associated Gen. Contractors v. Met. Water Dist. of S. Cal., 159 F.3d 1178, 1181 (9th Cir. 1998). The facts summarized above are the

1 material facts alleged by Plaintiff in his First Amended Complaint. They form the basis for
2 each of Plaintiff's claims. A plausible claim for relief is not stated as to either of the
3 HENDERSON DEFENDANTS.

4 ¶24 alleges that PURDUE "failed to prevent Officer Nielson (sic) use of force which
5 was committed in his presence. On the contrary Detective Purdue chose not to de-
6 escalate the situation." ¶24 does not allege "facts" instead it states Plaintiff's conclusions
7 that there were factual circumstances (which have not been alleged by Plaintiff) which
8 established that PERDUE had a legal duty to intervene, at a point not identified, in
9 OFFIECER NIELSON'S conduct. There are no facts alleged which, if accepted as true
10 would establish the existence of a situation in which PERDUE would have had a duty and
11 an opportunity to intervene. There are no facts alleged, only speculative and conclusory
12 allegations that circumstances had "escalated", much less that facts establish a duty to
13 de-escalate.
14

15
16 ¶25 alleges that NIELSON and PERDUE "unreasonably seized Plaintiff." Again
17 Plaintiff relies upon a completely conclusory statement instead of facts. All of the claims
18 alleged against the HENDERSON DEFENDANTS arise from the "factual" allegations
19 against DETECTIVE PERDUE. The minimal facts actually alleged are insufficient to
20 establish the existence of a plausible claim for relief against any of the HENDERSON
21 DEFENDANTS.
22

23 In order for there to be a claim stated against the HENDERSON DEFENDANTS
24 pursuant to 42 U.S.C. §1983, there must be factual allegations that plausibly establish that
25 such defendants were participants in a deprivation of Plaintiff's constitutional rights. The
26 Plaintiff's claims alleged against the CITY and CHIEF MOERS are all premised upon the
27 allegations against PERDUE, the only Henderson police officer alleged to have been
28

1 present during the alleged encounter with Plaintiff. If the allegations do not state a claim
2 for relief against PERDUE, there can be no claims that can survive against the CITY or
3 CHIEF MOERS.

4 Plaintiff's Opposition makes clear that PERDUE'S alleged actions of holding his
5 badge against the passenger window of Plaintiff's vehicle, identifying himself as a police
6 officer and yelling at Plaintiff, even profanities, is not contended to constitute any violations
7 of Plaintiff's constitutional rights. The focus of Plaintiff's claim concerning PERDUE'S
8 conduct is that he allegedly failed to prevent NIELSON from injuring Plaintiff.

9
10 Plaintiff has failed to allege facts sufficient to state a plausible claim for relief
11 premised upon a failure of PERDUE to intervene to prevent NIELSON from allegedly
12 pulling of Plaintiff's finger. However, even if it is assumed arguendo that NIELSON'S
13 conduct violated one of Plaintiff's constitutional rights, PERDUE is not liable under § 1983
14 simply because he was present. The Plaintiff's allegations summarized above make clear
15 that there was an extremely brief interchange with the Defendant officers before NIELSON
16 allegedly "grabbed HARRIS' hand and maliciously pulled his finger." See ¶ 23.

17
18 A duty to intercede only occurs when there is a **realistic opportunity** to intercede.
19 Cunningham v. Gates, 229 F. 3d 1271, 1289-90 (9th Cir. 2000). In Cunningham, the non-
20 shooting officers were found to not have had a "realistic opportunity" to prevent the
21 shooters from firing at Plaintiff. To establish a claim for failure to intercede to stop another
22 officer from using excessive force, the facts must show that the officer observed or had
23 reason to know that excessive force would be or was being used and that the officer had
24 both the opportunity and the means to prevent the harm from occurring. Nance v. Sammis,
25 586 F. 3d 604, 612 (8th Cir. 2009); See also Farrington v. Smith, 707 F. 3d 963, 972 (8th
26 Cir. 2013). In Lewis v. Downey, 581 F 3d 467, 472 (7th Cir. 2009) a guard who stood by
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1 while another guard shot a taser at an inmate in response to an order by his superior
2 officer was found to have had no realistic opportunity to stop the other guard from
3 discharging his taser.

4 In Krout v. Goemmer, 583 F. 3d 557, 565 (8th Cir. 2009) the court added further
5 dimension to “realistic opportunity”, finding that the duration of the subject episode is a
6 factor that is relevant to determining whether there was a sufficient amount of time to
7 permit interference of a passive collaborator. It is well established that presence and
8 observance of excessive force is not the sole requirement for there to be liability for failure
9 to intercede.
10

11 The facts alleged viewed in the light most favorable to Plaintiff show that the contact
12 between NIELSON and Plaintiff was very brief before the alleged injury and that NIELSON
13 unexpectedly and suddenly grabbed Plaintiff’s hands, at which point the alleged injury
14 occurred. PERDUE is not required to be clairvoyant or telepathic. There is no allegation
15 that PERDUE observed or was aware that NIELSON had “grabbed” Plaintiff’s hand or had
16 inflicted any injury or pain at the time the incident allegedly occurred. There is nothing
17 from which it can even be inferred that PERDUE had any advance warning that NIELSON
18 planned to use physical force of any kind on Plaintiff. Once NIELSON allegedly grabbed
19 Plaintiff’s hand and inflicted pain the incident was over. There is nothing from which it can
20 be inferred that the sudden contact by NIELSON with Plaintiff was of anything other than a
21 short duration (as described NIELSON grabbed Plaintiff’s hand and pulled his finger).
22 Even if PERDUE had been aware that NIELSON grabbed Plaintiff’s hand, there is not any
23 factual allegation from which it can reasonably be inferred that there was any opportunity
24 for PERDUE to prevent NIELSON from doing so.
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1 A plausible factual basis for a failure to intercede claim is absent, even if all of
2 Plaintiff's allegations are accepted as true with reasonable inferences drawn in Plaintiff's
3 favor. In the absence of such a fact based allegation, claims against the HENDERSON
4 DEFENDANTS should be dismissed.

5
6 **III.**

7 **A PLAUSIBLE CLAIM FOR RELIEF HAS NOT BEEN STATED AGAINST CHIEF**
8 **MOERS FOR SUPERVISORY LIABILITY**

9 In order to establish a claim for § 1983 supervisory liability, a plaintiff must establish
10 that supervisory personnel committed the tort, set in motion the events which he knew or
11 reasonably should have known would cause the constitutional harm, or acquiesced in a
12 constitutional deprivation by subordinates. Hydrick v. Hunter, 500 F. 3d 978, 988 (9th Cir.
13 2007); see also Moss v. Secret Service, 675 F. 3d 1213, 1231 (9th Cir. 2012).

14 Plaintiff's Opposition reiterates a litany of speculative and conclusory statements
15 alleged in the First Amended Complaint and represents them to be "fact". In actuality, they
16 are neither "fact" nor are they supported by any factual allegations. While conceding that
17 CHIEF MOERS was not present at the scene, Plaintiff asserts that CHIEF MOERS is
18 individually liable pursuant to a theory of supervisory liability.

19
20 In order for a person acting under the color of state law to be liable under § 1983
21 there must be a showing of personal participation in the alleged rights deprivation. Jones
22 v. Williams, 297 F. 3d 930, 934 (9th Cir. 2002). A supervisor is liable under § 1983 for a
23 subordinate's constitutional violations, "if the supervisor participated in or directed the
24 violations, or knew of the violations and failed to act to prevent them." Taylor v. List, 880
25 F.2d 1040, 1045 (9th Cir.1989).

26
27 When a named defendant holds a supervisory position, the causal link between
28 the defendant and the claimed constitutional violation must be specifically alleged. See

1 Gayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441
2 (9th Cir. 1978), cert. denied, 442 U.S. 941, 99 S.Ct. 2883, 61 L.Ed.2d 311 (1979). To state
3 a claim for relief under § 1983 for supervisory liability, plaintiff must allege some **facts**
4 indicating that the defendant either: personally participated in the alleged deprivation of
5 constitutional rights; knew of the violations and failed to act to prevent them; or
6 promulgated or “implemented a policy so deficient that the policy ‘itself is a repudiation of
7 constitutional rights’ and is ‘the moving force of the constitutional violation.’ ” Hansen v.
8 Black, 885 F.2d 642, 646 (9th Cir. 1989) (internal citations omitted); Taylor v. List, 880 F.2d
9 1040, 1045 (9th Cir. 1989). Although federal pleading standards are broad, some facts
10 must be alleged to support claims under § 1983. See Leatherman v. Tarrant County
11 Narcotics Unit, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Plaintiff has
12 failed to allege facts sufficient to state a claim for supervisory liability under § 1983 against
13 CHIEF MOERS.
14

15
16 Plaintiff’s reliance upon Larez v. City of Los Angeles, 946 F. 3d 630 (9th Cir. 1991)
17 is misplaced. Larez does not support his contention that he has adequately plead a claim
18 for supervisory liability. Larez did not address the sufficiency of the allegations of a
19 plaintiff’s complaint against a police chief. However, the case did itemize the claims
20 against the police chief concerning policies and procedures which plaintiff there was
21 permitted to pursue. Unlike those alleged by HARRIS in the present case, the policies and
22 procedures which formed the basis of the claims against Gates in Larez were specific and
23 directly addressed the conduct upon which the plaintiff’s claims were premised. There is
24 nothing which would indicate that the original pleading was completely devoid of
25 supporting factual allegations as is the case with the HARRIS First Amended Complaint
26 here.
27
28

1 HARRIS has alleged that the PERDUE was working on a task force with NIELSON
2 who was from a completely separate law enforcement agency. There is no allegation and
3 no factual support for a claim that CHIEF MOERS was supervising the task force or its
4 operations. HARRIS' apparent position is that CHIEF MOERS and the CITY are
5 responsible through PERDUE for alleged unconstitutional deprivations by NIELSON who
6 was not in CHIEF MOERS' chain of command and over whom CHIEF MOERS had no
7 supervisory authority. Plaintiff in essence seeks to impute NIELSON'S actions to
8 PERDUE and through PERDUE to CHIEF MOERS and the CITY. Neither CHIEF MOERS
9 nor the CITY has derivative liability as a result of the NIELSON'S actions.
10

11 In any event, HARRIS has failed to even allege facts sufficient to establish the bare
12 elements of a claim for supervisory liability against CHIEF MOERS. He was not at the
13 scene, he did not participate and he did not know of violations being committed and fail to
14 prevent them. Plaintiff has failed to articulate any specific policy that he alleges applied to
15 PERDUE'S alleged conduct with respect to his contact with HARRIS leading to a
16 constitutional deprivation. Plaintiff's allegations regarding policies are not specific and not
17 sufficiently specific to meet the pleading standards of Iqbal and Trombley. The claim
18 against CHIEF MOERS for supervisory liability should be dismissed for failure to state a
19 claim.
20

21 IV.

22 A PLAUSIBLE CLAIM FOR MUNICIPAL LIABILITY HAS NOT BEEN STATED AND 23 DISMISSAL IS APPROPRIATE

24 In order to state a *Monell* claim against a municipality for "deliberate inaction," the
25 plaintiff must state: "(1) that he [or she] possessed a constitutional right of which he [or
26 she] was deprived; (2) that the municipality had a policy; (3) that this policy amounts to
27 deliberate indifference to the plaintiff's constitutional right; and (4) that the policy was the
28

moving force behind the constitutional violation.” Beckwith v. Pool, 2013 WL3049070 (D. Nev. 2013) quoting Miranda v. City of Cornelius, 429 F.3d 858, 868 (9th Cir. 2005).

Without allegations of **fact** which establish a plausible basis for a claim of a violation of Plaintiffs’ constitutional rights, no action can lie for municipal liability under Monell v. Dept. of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611(1978). See also Burns v. Barreto, 2011 WL 476505, 4 (E.D. Cal. 2011). A municipality can only be liable if a municipal policy was the **driving force** behind the constitutional deprivation. Villegas v. City of Colton, 2010 LEXIS 130454; 2010 WL 5252721 (C.D. Cal.); Galen v. County of Los Angeles, 477 F. 3d 652, 667 (9th Cir. 2007). Vague or generalized allegations concerning policies alleged to have caused an alleged deprivation are not enough. A Plaintiff seeking to impose liability upon a municipality under § 1983, is required to identify **a specific policy or custom** as the basis for his claim. Monell, supra at 694. HARRIS has not identified with specificity any municipal policy alleged to have a direct nexus to a constitutional deprivation alleged against the CITY.

In Cunningham, supra, the court stated that:

It is by now axiomatic that the doctrine of *respondeat superior* does not apply to claims under section 1983. See Voutour v. Vitale, 761 F.2d 812, 819 (1st Cir.1985). A municipality or its supervisory personnel can be held liable for the constitutional misconduct of its employees **only on the basis of an “affirmative link” between their acts and those of the offending employee.** *Id.* at 820. In order to establish municipal liability, the plaintiff must show that the acts or omissions of the municipality's policymakers evidence “deliberate indifference” to the rights of its inhabitants. Canton v. Harris, 489 U.S. 378, 387–90, 109 S.Ct. 1197, 1204–05, 103 L.Ed.2d 412, 426–27 (1989). Supervisors similarly can be held liable only on the basis of their own acts or omissions, amounting at the least to “reckless” or “callous” indifference to the constitutional rights of others. Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 562 (1st Cir.1989). Emphasis added.

1 While alleging that PERDUE'S culpable conduct was the failure to intercede,
2 HARRIS seems to attempt to claim that the CITY and CHIEF MOERS are responsible for
3 the alleged underlying violation by NIELSON who Plaintiff concedes is not an employee of
4 the CITY or subject to supervision or direction of CHIEF MOERS. There is no "affirmative
5 link" or nexus between NIELSON'S conduct and the CITY or MOERS. Neither the CITY
6 nor MOERS can be held legally responsible for the conduct of NIELSON which is the
7 conduct which forms the basis for all HARRIS' claims of constitutional deprivation. There
8 are no allegations that PERDUE ever had any physical contact with HARRIS and it is not
9 alleged that PERDUE used excessive force.

11 Based upon the few factual allegations stated in the First Amended Complaint there
12 is no connection between PERDUE'S conduct during the incident and the broad and
13 vague allegations made by HARRIS concerning CITY policies upon which HARRIS'
14 *Monell* claims are based. For example, HARRIS states in his First Amended Complaint
15 and again in his Opposition that, "Henderson maintained de facto policies, and
16 organizational customs and cultures to handcuff and use painful holds on citizens in traffic
17 stops and to give 'street justice' to individuals whom Henderson officers believed had
18 disrespected their authority." (Doc. 28, pg. 10, ln. 11 -14) There is no allegation that
19 HARRIS was handcuffed or that PERDUE touched HARRIS or had any physical contact
20 with him. Even if it were assumed that such a policy existed, there is no arguable nexus
21 between said policy and HARRIS' alleged injuries.

24 None of the CITY'S policies, real or as imagined by Plaintiff, could be the moving
25 force for PERDUE'S actions because NIELSON was not subject to the CITY'S policies.
26 None of the overly broad, nonspecific descriptions of alleged CITY policies set forth by
27 HARRIS in his First Amended Complaint could have been the moving force for HARRIS'

1 injuries as he is alleged to have received them. Likewise neither MOERS nor the CITY
2 were legally capable of ratifying the conduct of NIELSON, which is the alleged basis for
3 HARRIS' claim of constitutional deprivation.

4 Plaintiff acknowledges that more than acquiescence by a policymaker is required to
5 constitute ratification. For ratification to occur, a *policymaker* must make a deliberate
6 choice among many alternatives. Plaintiff provides no factual basis that CHIEF MOERS
7 is a "policymaker" with the ability to bind the CITY for purposes of ratifying an
8 unconstitutional act. Further, CHIEF MOERS is acknowledged not to have been present
9 and there is no allegation that he was personally directing the actions of PERDUE during
10 the incident in issue. As a result, any involvement would have been after the fact and
11 there would not be a choice to make in terms of directing that PERDUE take some other
12 action at the scene. It is the conduct of NEILSON, over whom the CITY and MOERS have
13 no alleged control, who allegedly committed the constitutional deprivation for which
14 HARRIS seeks recovery. Neither the CITY nor MOERS has a relationship with NIELSON
15 which would give them the legal ability to direct or to ratify his conduct.

16
17
18 Dismissal of Plaintiff's municipal liability claim against the CITY OF HENDERSON is
19 appropriate.

20
21 **V.**

22 **PLAINTIFF'S STATE LAW CLAIMS AGAINST CHIEF MOERS ARE BARRED**
23 **BY NRS 41.0335**

24 Plaintiff has conceded that CHIEF MOERS was not present during the traffic stop
25 out of which his First Amended Complaint arises and has not opposed the Motion to
26 Dismiss with respect to dismissal of the state law claims alleged against CHIEF MOERS
27 pursuant to the provisions of NRS 41.335(1)(b).
28

1 NRS 41.0335(1)(b) expressly provides that **no action** may be brought against a
2 chief of a police department premised solely upon any act or omission of an officer of the
3 department. All of HARRIS' state law claims in the instant action are premised upon the
4 alleged conduct of PERDUE. In Schultz v. Lamb, 504 F. 2d 1009 (9th Cir. 1974) the court
5 held that an action for false imprisonment was properly dismissed against the Clark
6 County Sheriff pursuant to NRS 41.0335 and that the statute relieved the individuals
7 covered by the statute from respondeat superior liability.
8

9 Based on the above and the Plaintiff's lack of opposition thereto, Plaintiff's 4th Claim
10 for false arrest/false imprisonment; 5th Claim for intentional infliction of emotional distress
11 and 6th Claim for negligence alleged against CHIEF MOERS under state law should be
12 dismissed pursuant to NRS 41.0335.
13

14 VI.

15 **PLAINTIFF HAS FAILED TO ALLEGE SUFFICIENT FACTS TO SUPPORT HIS STATE 16 LAW CLAIMS AGAINST THE HENDERSON DEFENDANTS**

17 The facts alleged do not state sufficient facts to support the existence of Plaintiff's
18 state law claims against the HENDERSON DEFENDANTS.
19

20 **A. False Arrest/False Imprisonment Claim**

21 Plaintiff primarily relies on authorities addressing false imprisonment claims against
22 individuals who are not affiliated with law enforcement agencies in his Opposition and
23 seeks to have this court apply an inappropriate standard. He ignores the fact that the
24 conduct which may constitute a false imprisonment if done by an individual who is not
25 acting in a law enforcement capacity does not constitute a false imprisonment when law
26 enforcement is involved. Under Nevada law, false imprisonment is defined as the
27 confinement or detention of another person without sufficient legal authority. NRS
28 200.460.

It is well settled that in certain situations a police officer may detain a person for the purpose of investigating possible criminal behavior, even absent the existence of probable cause to arrest that person. Ramirez v. City of Reno, 925 F. Supp. 681, 685 (D. Nev. 1996); citing Adams v. Williams, 407 U.S. 143, 145-46, 92 S.Ct. 1921, 1922-23, 32 L.Ed.2d 612 (1972); Terry v. Ohio, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968); and Pellegrino v. United States, 73 F.3d 934 (9th Cir.1996). Under Nevada law, a law enforcement officer is expressly authorized by state statute to detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime. NRS 171.123.

The facts alleged do not state that needed for a prima facie case of false arrest or imprisonment against PERDUE. The facts alleged, even if accepted as true, do not state a claim upon relief could be granted against CHIEF MOERS. The 4th Claim for Relief should be dismissed for failure to state a claim against all of the HENDERSON DEFENDANTS, or any of them, for false arrest or false imprisonment.

B. Intentional Infliction of Emotional Distress

The elements of an intentional infliction of emotional distress (IIED) claim are: (1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) actual or proximate causation. Dillard Dep't Stores, Inc. v. Beckwith, 115 Nev. 372, 989 P.2d 882, 886 (Nev.1999). The defendant's actions must "go beyond all possible bounds of decency [and be] atrocious and utterly intolerable." Hirschhorn v. Sizzler Rests. Int'l, Inc., 913 F.Supp. 1393, 1401 (D.Nev.1995). See also French v. Carson City, 2015 WL461647 (d. Nev. 2015) and Beckwith, supra.

1 Plaintiff has failed to allege facts which would, if accepted as true, establish a claim
2 against any of the HENDERSON DEFENDANTS in this action for IIED. The only use of
3 force mentioned in HARRIS' First Amended Complaint (Doc. 28, ¶ 23) is specifically
4 alleged to have been by NIELSON who is not identified as a CITY employee. HARRIS'
5 factual allegations fail to establish whether, when, how or by whom Plaintiff was allegedly
6 handcuffed or for how long. Although at ¶ 64 he references NIELSON and PERDUE'S
7 "use of force by handcuffing and false imprisonment" the allegation is vague, conclusory
8 and nonspecific. There is no allegation that PERDUE ever had physical contact with the
9 Plaintiff.
10

11 In any event, Plaintiff has failed to allege facts which would be sufficient to support
12 a claim for IIED against the HENDERSON DEFENDANTS, or any of them, and the 5th
13 Claim for Relief should be dismissed for failure to state a claim.
14

15 C. Negligence

16 To state a claim for negligence, a plaintiff must allege that: (1) defendant owed a
17 duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the
18 legal cause of the plaintiff's injury; and (4) the plaintiff suffered damages. Scialabba v.
19 Brandise Constr. Co., Inc., 112 Nev. 965, 968, 921 P.2d 928, 930 (Nev.1996). Whether a
20 defendant owes plaintiff a duty of care is a question of law. *Id.* at 969, 921 P.2d 928.
21

22 HARRIS' claim against the HENDERSON DEFENDANTS is allegedly premised
23 upon the contention that PERDUE did not prevent NIELSON from injuring the Plaintiff.
24 While claims under such a theory have been permitted within the context of § 1983
25 actions, there is no authority supporting the existence of a similar duty to prevent a third
26 party from causing an injury to a plaintiff, under a general theory of negligence. It is
27 generally true that government is not liable for failing to prevent the unlawful acts of others.
28

1 The duty of government runs to all citizens and is to protect the safety and well-being of
2 the public at large. Bruttomesso v. Las Vegas Metro. Police Dep't, 591 P.2d 254, 255
3 (Nev.1979) (in which a claim against a police department for not preventing injury to the
4 plaintiff failed). In the absence of a special relationship or duty particular to Plaintiff, which
5 has not been alleged here, PERDUE is not liable to Plaintiff under a negligence theory and
6 neither are the other HENDERSON DEFENDANTS. Saavedra v. Las Vegas Metro Police
7 Dept., 2012 WL1019159 (D. Nev. 2012).

9 Plaintiff's cites the general elements of negligence in his response and asserts that
10 respondeat superior applies to the city. He asserts that the allegations making conclusory
11 statement, which do not tie to specific facts alleged, state a claim for negligence.
12 However, in the absence of specific facts, a claim is not stated. Plaintiff states that his
13 negligence claims are premised upon the allegations that the duties owed (italicized) to
14 Plaintiff were as follows:

16 a. *To refrain from using unreasonable force.* There are no allegations of
17 force used by PERDUE, thus no breach of duty by any of the HENDERSON
18 DEFENDANTS.

19 b. *To refrain from creating a situation where force is used.* There are no
20 allegations of fact that force was used by PERDUE. There are no allegations of fact which
21 would support PERDUE was "creating a situation where force was used." However,
22 contrary to Plaintiff's assertion, there was no duty as discussed above for PERDUE to
23 read NIELSON'S mind and intervene. Plaintiff provides no legal authority which supports
24 his contention that the HENDERSON DEFENDANTS are responsible for NIELSON'S
25 actions. An adequate nexus has not been alleged or established.

1 c. *To refrain from abusing the authority granted to them.* Again the
2 factual allegations concerning the HENDERSON DEFENDANTS' conduct in this matter, if
3 accepted as true, do not support the existence of a claim against any of them premised
4 upon this asserted duty.

5
6 d. *To refrain from violating Plaintiff's constitutional rights.* For all of the
7 reasons already stated hereinabove, the Plaintiff has failed to allege sufficient facts to
8 establish constitutional violations by the HENDERSON DEFENDANTS or any of them.
9 Hence, there can be no breach of duty.

10 HARRIS has failed to allege sufficient specific facts, which if accepted as true,
11 establish the breach of a duty owed to Plaintiff by the HENDERSON DEFENDANTS, or
12 any of them. Plaintiff's 6th Claim for Relief should be dismissed for failure to state a claim
13 against the HENDERSON DEFENDANTS.

14 VII.

15 **PLAINTIFF'S ALTERNATIVE REQUEST TO BE ALLOWED TO AMEND THEIR FIRST** 16 **AMENDED COMPLAINT SHOULD BE DENIED**

17
18 Plaintiff requests, in the alternative, that he be permitted to amend his First
19 Amended Complaint, "to clarify any deficiencies". At p. 22, ln. 16-28 of Plaintiffs'
20 Opposition (Doc.40). Plaintiff has not attached a copy of his proposed amended pleading
21 as required by LR 15-1 and has not indicated in his Opposition what would be added or
22 changed.

23 It is within the court's discretion whether to grant or deny a motion to amend.
24 Lockheed Martin Corp. v. Network Solutions, 194 F. 3d 980 (9th Cir. 1999). In the instant
25 matter, the legal basis for the causes of actions alleged by Plaintiff are tenuous, as more
26 fully discussed above and in the Motion to Dismiss. The Section 1983 claims are devoid
27 of allegations of a violation of any cognizable constitutional right by any of the
28

HENDERSON DEFENDANTS, which is an essential element. Further, the First Amended Complaint is an amended complaint. How many bites of the apple does Plaintiff get? Where the legal basis for a cause of action is tenuous, futility supports denial of a request to amend. *Morongo v. Band of Mission Indians*, 893 F. 2d 893, 1079 (9th Cir. 1990).

The statute of limitations has run in this matter and Plaintiffs should not be permitted to again amend their First Amended Complaint in a manner which would state claims not previously alleged. Premised upon such limitations, amendment would be futile. Plaintiff should not be permitted to amend without having submitted a proposed Second Amended Complaint pursuant to LR-15-1.

VIII.

CONCLUSION

For the foregoing reasons, Defendants CITY OF HENDERSON, DETECTIVE PERDUE and CHIEF PATRICK MOERS respectfully request that this Honorable Court enter its order dismissing each and every claim for relief alleged against them in Plaintiff's First Amended Complaint for failing to state any claims upon which relief can be granted.

DATED this 7th day of October, 2015.

CITY OF HENDERSON
JOSH M. REID, CITY ATTORNEY

/s/ Nancy D. Savage
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CHIEF PATRICK MOERS

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I hereby certify that I am an employee of the CITY OF HENDERSON, and that on the 7th day of October, 2015, I served by depositing the same in the United States Mail, postage fully prepaid thereon, a true and correct copy of the foregoing, DEFENDANTS CITY OF HENDERSON, DETECTIVE PERDUE AND CHIEF PATRICK MOERS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT, addressed as follows:

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